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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. 317

JAMES H. MATTHEWS & CO. (INDUSTRIAL MARKING PRODUCTS DIVISION), Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

NICHOLAS UNKOVIC
LEONARD L. SCHEINHOLTZ
REED, SMITH, SHAW & MCCLAY
Counsel for Petitioner

747 Union Trust Building
Pittsburgh, Penna. 15219

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

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v.

NATIONAL LABOR RELATIONS BOARD, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

James H. Matthews & Co., Industrial Marking Products Division, petitioner, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on February 11, 1965, in which the Court directed enforcement of the Board's Order.

OPINIONS BELOW

The Opinion of the Court of Appeals entered February 11, 1965 is reported at 342 F.2d 129 (Appendix p. 13). The Board's Decision and Order in the unfair labor practice proceeding adopting the Trial Examiner's Decision (R. 2a-13a)[1] is reported at 145 NLRB 1680 (R. 13a-14a). The Regional Director's Report on Objections and Certification of Representative is unreported but is set forth in the Joint Appendix (R. 39a-60a).

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1. "R" references are to the Joint Appendix to the Briefs of the parties in the Court below.

JURISDICTION

The decree of the Court of Appeals (Appendix, p. 20, *infra*) was entered on April 6, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Where a Consent Election was conducted pursuant to §102.62(a) of the Board's Rules and Regulations, which provide the rulings and determinations by the Regional Director of the results of such election are to be final, in subsequent unfair labor practice proceedings resulting from Employer's refusal to bargain in order to test the validity of the Regional Director's Decision overruling Objections to the election, must the Circuit Court apply the "substantial evidence" test to the unfair labor practice findings rather than just determining whether the Regional Director's decision was arbitrary or capricious?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., §§ 151, *et seq.*) are as follows:

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * * * *

Statute Involved.

"Sec. 9 (c)...(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

* * * * * * *

"Sec. 10 (c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: . . .

* * * * * * *

(e) . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . ."

STATEMENT OF THE CASE

James H. Matthews & Co. is a Pennsylvania corporation having places of business and plants in various states. The Industrial Marking Division, involved herein, operates two plants in Pittsburgh, Pennsylvania where it is engaged in the manufacture of marking devices. (R. 3a). On January 24, 1963, after a campaign which began on October 16, 1962, the IUE filed a representation petition seeking an election among all production and maintenance employees of the Industrial Marking Products Division. (R. 1a).

On February 5, 1963 the Employer and the Union entered into an Agreement for a Consent Election pursuant to which the Board conducted an election on February 21, 1963. In the election the Union prevailed by a narrow margin when 72 votes were cast for the Union and 67 for no Union. (R. 39a). A change in only three ballots would have affected the result of the election.

On February 28, 1963, the Employer filed timely Objections to the election alleging the results of the election were affected by a leaflet distributed by the Union on February 19, 1963, just two days before the election, which contained numerous false and misleading statements concerning the Employer's pension and insurance plans, accused the Employer of cheating its employees out of $50,639.00 by appropriating for its own use dividends belonging to the employees, and misrepresented the hospitalization insurance benefits which the Union had negotiated with other employees. (R. 1a, 39a, 41a-54a).

Thereafter, the Regional Director investigated Employer's Objections, and approximately four months later on June 26, 1963, issued his Report on Objections and Certification of Representative. (R. 1a, 39a-60a).

In its Objections, the Employer claimed fourteen specific statements in the Union's leaflet of February 19, 1963, were false and misleading. (R. 40a-54a). In his Report on Objections, the Regional Director found that seven of these fourteen statements were either only partially true,[2] or inaccurate,[3] or misleading representations of fact,[4] and another was ambiguous and subject to different interpretations.[5] (R.54a-57a).

The Regional Director concluded that although these misrepresentations of fact were presumably made by the Union's pension and insurance experts, they did not concern matters within the special knowledge of the Union, but, rather constituted matters which the employees could evaluate from their own independent knowledge. (R. 54a-55a). Also, that the Employer had sufficient opportunity to correct any misrepresentation (presumably, even those concerning the hospitalization insurance benefits the Union had negotiated with other employers) within the short time remaining before the election. (R. 55a-57a).

The Regional Director concluded that the Union's distribution of the February 19th leaflet did not exceed the bounds of legitimate campaign propaganda sufficient to warrant setting aside the election; overruled the

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2. Objections 1(a) (b) (e) (R. 40a-44a, 46a-47a).
3. Objections 1(f) (g) (h) (R. 47a-48a).
4. Objection 1(j) (R. 49a).
5. Objection 1(m) (R. 52a-53a).

Objections in their entirety and certified the Union. (R. 57a, 59a).

On June 27, 1963 the Union requested that the Employer meet with it for the purpose of opening collective bargaining negotiations. In order to obtain a review of the Regional Director's determination the Employer by letter dated July 3, 1963 declined to meet with the Union explaining that in its opinion, "the Regional Director's Report was not based on substantial evidence considered as a whole, was unreasonable, arbitrary, constituted an abuse of discretion, and was not in conformity with NLRB policies or the provisions of the Act." (R. 6a)

On August 9, 1963, refusal to bargain charges were filed against the Employer at Case No. 6-CA-2324, and on August 28, 1963, a Complaint was issued by the Regional Director for the Sixth Region. (R. 1a-2a).

The Trial Examiner in his decision dated October 24, 1963 found that since the Employer had bound itself to accept the Regional Director's determination the Employer must be held to its commitment in the absence of fraud, arbitrary or capricious action on the part of the Regional Director. (R. 9a).

The Board in its decision issued February 11, 1964 adopted the findings, conclusions and recommendations of the Trial Examiner. (R. 13a-14a). Subsequently, on the Board's petition for an enforcement the Circuit Court of Appeals for the Third Circuit issued its opinion on February 11, 1965. 342 F.2d 129 (Appendix p. 13).

On April 6, 1965 the Court denied the Employer's Petition for Rehearing (Appendix p. 21) and issued its decree on the same date granting enforcement of the Board's Order (Appendix p. 20).

REASONS FOR GRANTING THE WRIT

This case presents the question as to whether a party by entering into a Consent Election Agreement pursuant to §102.62 of the Board's Rules and Regulations (29 C.F.R.) which provide the rulings and determinations by the Regional Director of the results of the election shall be final, is thereby deprived of the right to have the Circuit Court apply the statutory "substantial evidence" test to subsequent unfair labor practices and is limited on appeal to having the Circuit Court determine only whether the Regional Director's action was abritrary or capricious.

This issue raises important questions of national interest with regard to the administration of the National Labor Relations Act which have not been but which should be reviewed by the Supreme Court.[6]

The Circuit Court specifically held that its "scope of review is subject to the restrictive limitations imposed by the [consent election] agreement". (Appendix, p. 17 *infra*)

At least four other Circuit Courts have similarly interpreted the effect of a consent election agreement. *Elm City Broadcasting Corp. v. N.L.R.B.*, 228 F. 2d 483, 485 (2d Cir. 1955); *N.L.R.B. v. J. W. Rex Company*, 243 F. 2d 356, 358 (3rd Cir. 1957); *Diversey Corporation v. N.L.R.B.*, 325 F. 2d 489, 491 (7th Cir. 1963); *N.L.R.B. v. Parkhurst Manufacturing Company*, 317 F. 2d 513, 516,

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6. In its 29th Annual Report (1964) the Board reported processing 3,496 Consent Election Agreements; this represented over 40% of the Petitions processed by the Board.

517 (8th Cir. 1963); *N.L.R.B. v. Sumner Sand & Gravel Company,* 293 F. 2d 754 (9th Cir. 1961).[7]

The Substantial Evidence Test Must Be Applied in Reviewing Unfair Labor Practice Findings

Under Section 9 (c) of the Act, 29 U.S.C.A. §159 (c) (1), where there is reasonable cause to believe a question of representation exists the Board must provide for an appropriate hearing upon due notice. Section 9(c)(4) of the Act, 29 U.S.C.A. §159, (c)(4), however, provides nothing in this Section [9] shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with the regulations and rules of decision of the Board. It is submitted the latter section refers only to a representation hearing and does not limit in any way the standard of proof required in reviewing subsequent unfair labor practice findings. This standard is governed by Section 10(e) of the Act.

A representation certification is not ordinarily subject to review under the Act; however, as in the present case, where an order has been issued by the Board prohibiting unfair labor practices determined on the basis of facts established in a prior representation proceeding the record in such representation proceeding is included in the record upon which the reviewing court must base its decree. *A.F.L. v. Labor Board,* 308 U.S. 401 (1940); *Boire v. Greyhound Corp.,* 376 U.S. 473, 477 (1964); *N.L.R.B. v. Sklar,* 316 F.2d 145, 147 (6th Cir. 1963).

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7. However, the Court, in its decision, states: "We find substantial support in the record for these findings of fact."

Reasons for Granting the Writ.

The standard for review for unfair labor practice proceedings has been set forth in Section 10(e) of the National Labor Relations Act, as amended 29 U.S.C.A. §160(e) and in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951) and *N.L.R.B. v. Walton Mfg. Co.*, 369 U.S. 404 (1962).

In the latter case in a per curiam decision the Court pointed out that there is no place in the statutory scheme for one test for the substantiality of evidence in reinstatement cases and another test in other cases citing *Labor Board v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951) and *Universal Camera Corp.* (*supra*).

In *Celanese Corp. v. N.L.R.B.*, 291 F.2d 224 (7th Cir. 1961), the Court said at page 225:

> "Section 10(e) of the Labor Management Relations Act, 1947, 29 U.S.C.A. §160(e), which is similar to the provisions of the Administrative Procedure Act, 5 U.S.C.A. §1001 et seq., requires that the court determine the substantiality of the evidence supporting a Labor Board decision on the record as a whole.
>
> * * * * * * *
>
> "There is no conflict or contradiction between the substantial evidence rule determinative of the scope of review and the principle whereunder the Board is entrusted with wide discretion in establishing the procedures and safeguards necessary to insure the fair and free choice of bargaining representatives as enunciated in National Labor Relations Board v. A. J. Tower Co., 1946, 329 U.S. 324, 330, 67 S.Ct. 324, 91 L.Ed. 322. These rules do not conflict because they affect differing spheres of

activity. The Board's wide discretion lies in the initial promulgation of rules and regulations, while the court exercises its duties in reviewing decisions involving application of the Board's rules. Judicial review in these cases is not concerned with the wisdom of the Board's policy but must determine whether the record as a whole supports the findings and conclusions respecting compliance with the policies, rules, and regulations promulgated by the Board."

The test of "substantial evidence on the record considered as a whole" applies to the review of all unfair labor practice proceedings, and there is no exception where, as here, the refusal to bargain is intended to test the validity of a certification issued by the Regional Director in an election conducted pursuant to a consent election agreement.

CONCLUSION

For the reasons stated above, the decision in this case raises important questions of national interest with regard to the administration of the National Labor Relations Act which have not been but which should be reviewed by the Supreme Court and, therefore, the petition for writ of certiorari should be granted.

Respectfully submitted,

NICHOLAS UNKOVIC
LEONARD L. SCHEINHOLTZ
REED, SMITH, SHAW & MCCLAY
747 Union Trust Building
Pittsburgh, Pennsylvania 15219
Counsel for Petitioner

Dated: July 2, 1965

APPENDIX

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
JAS. H. MATTHEWS & CO., INDUSTRIAL MARKING PRODUCTS DIVISION, Respondent.

No. 14880

United States Court of Appeals Third Circuit

Argued Dec. 8, 1964.

Decided Feb. 11, 1965.

Rehearing Denied April 6, 1965.

Opinion of United States Court of Appeals for Third Circuit

WILLIAM F. SMITH, Circuit Judge.

This is an enforcement proceeding under § 10(e) of the Labor Management Relations Act as amended, 29 U.S.C.A. § 160(e). The petition for enforcement is resisted on grounds hereinafter separately considered. The principal dispute centers upon the Board's determination that the Respondent's refusal to bargain was an unfair labor practice and upon the underlying decision reached by the Regional Director in a representation proceeding. There is no dispute as to the material facts.

After an organizational campaign extending over a period of approximately three months, the International Union of Electrical, Radio and Machine Workers, hereinafter referred to as the Union, filed a petition for cer-

tification as the exclusive representative of the maintenance and production workers employed in a division of the Respondent. While the petition was pending the Union and the Respondent, with the approval of the Regional Director, waived hearing and entered into a consent-election agreement authorized by § 9(c) (4) of the Act, 29 U.S.C.A. § 159(c) (4), and § 102.62 of the regulations, 29 C.F.R.

This agreement, in the form customarily used by the Board, provided, among other things, "that the determination of the Regional Director shall be final and binding upon any question * * * raised by any party hereto relating in any manner to the election." The agreement further provided that the "method of investigation of objections and challenges, including the question whether a hearing should be held in connection therewith, shall be determined by the Regional Director, whose decision shall be final and binding."

Between February 5, when the agreement was executed and docketed, and February 18, three days prior to the election, the Union and the Respondent engaged in extensive and almost daily distribution of campaign literature in which they presented their respective positions. There is no claim by either party that the literature distributed during this peried was in any way improper. However, on February 19, two days before the election, the Union distributed pamphlets which contained statements highly critical of a retirement and annuity plan sponsored by the Respondent and underwritten by the Equitable Life Assurance Society. The Respondent learned of the pamphlets before noon, and thereafter, in an effort to refute statements contained

therein, its personnel director and a supervisor spoke to a number of employees then in the plant. There was no other action taken.

The election was held in the afternoon of February 21, and in a close contest, in which 139 employees participated, the Union prevailed by the narrow margin of 5 votes. The Respondent filed timely objections to the election, alleging that the results were affected by fourteen false and misleading statements contained in the pamphlets. Thereupon the Regional Director orderd an investigation, during the progress of which his representatives conferred with officials of the Respondent and requested and received from them certain documentary evidence, including an affidavit made by the personnel director. The Respondent does not here question the adequacy of the investigation.

After the investigation had been concluded the Regional Director, as required by § 102.69(c) of the regulations, 29 C.F.R., prepared and served upon the parties a comprehensive report containing a detailed analysis of each of the allegedly false statements, which he severally described as "not complete representations of facts," "partially true," "partially correct," and "mere exaggerations." He found that a majority of the employees, particularly the participants in the retirement and annuity plan, had sufficient knowledge and information to enable them to evaluate the allegedly misleading statements. He found further that the officials of the Respondent, having knowledge of the retirement and annuity plan, were afforded ample time within which to refute the allegedly false statements contained in the pamphlets. The Regional Director concluded that

under the facts and circumstances the results of the election were not adversely affected by the distribution of the pamphlets. He overruled the objections as without merit and certified the union. The Respondent filed no exceptions to the report and made no request for a formal hearing.

Notwithstanding the certification, the Respondent refused to bargain and so notified the Union, claiming that the said report "was unreasonable, arbitrary, constituted an abuse of discretion, and was not in conformity with [Board] policies or the provisions of the Act." Thereupon the Union filed a charge upon which a complaint issued. When the matter came before the designated Trial Examiner the Respondent again raised the objections previously interposed in the representation proceeding. The Trial Examiner considered the record in light of the objections and in effect affirmed the report of the Regional Director. He found the Respondent guilty of an unfair labor practice within the meaning of § 8(a) (5) and (1), 29 U.S.C.A. § 158(a) (5) and (1), and recommended the issuance of a cease and desist order. The Board adopted the findings, conclusions and recommendations of the Examiner and issued an order in accord with the recommendations.

The Respondent challenges as "not supported by substantial evidence" the finding of the Trial Examiner as adopted by the Board but solely on the ground that the action of the Regional Director in the representation proceeding was arbitrary and not in conformity with the established policy of the Board. The questions raised by this challenge necessitate a reveiw of the representation proceeding.

[1] A representation certification is ordinarily not subject to review under the Act. A. F. L. v. National Labor Relations Board, 308 U.S. 401, 60 S.Ct. 300, 84 L.Ed. 347. However, a review is authorized where, as here, the employer's refusal to bargain in defiance of a certification "eventuates in a finding by the Board that an unfair labor practice has been committed." Boire v. Greyhound Corp., 376 U.S. 473, 477, 84 S.Ct. 894, 896, 11 L.Ed.2d 849 (1964); N. L. R. B. v. Sklar, 316 F.2d 145, 147 (6th Cir. 1963). The review is authorized as incidental to the review of the unfair labor practice proceeding. Ibid.

[2, 3] Where the parties to a representation proceeding have entered into a consent-election agreement, such as we have here, the scope of review is subject to the restrictive limitations imposed by the agreement, and the representation certification may not be set aside except upon proof that the action of the Board, or the Regional Director, was arbitrary and capricious. N. L. R. B. v. General Armature & Mfg. Co., 3 Cir., 192 F.2d 316, cert. den. 343 U.S. 957, 72 S.Ct. 1052, 96 L.Ed. 1357; N. L. R. B. v. J. W. Rex Company, 243 F.2d 356, 358 (3rd Cir. 1957); Diversey Corporation v. N. L. R. B., 325 F.2d 489, 491 (7th Cir. 1963); N. L. R. B. v. Parkhurst Manufacturing Company, 317 F.2d 513, 516, 517 (8th Cir. 1963); N. L. R. B. v. Sumner Sand & Gravel Company, 293 F.2d 754 (9th Cir. 1961); Elm City Broadcasting Corp. v. N. L. R. B., 228 F.2d 483, 485 (2nd Cir. 1955). Administrative action may be regarded as arbitrary and capricious only where it is not supportable on any rational basis. This court, and others, have heretofore held that "something more than error is necessary to spell out arbitrary or capricious action." N. L. R. B.

v. J. W. Rex Company, supra, 243 F.2d 358, and the cases therein cited; N. L. R. B. v. Parkhurst Manufacturing Company, supra, 317 F.2d 518. The fact that on the same evidence a reviewing court could have reached a decision contrary to that reached by the agency will not support a determniation that the administrative action was arbitrary and capricious.

[4] We are convinced upon our examination of the record that the action of the Regional Director, measured by recognized criteria, was anything but arbitrary and capricious. It appears from the report of the Regional Director that the representation certification was based upon a thoughtful consideration of the evidence as a whole and a discriminating evaluation of the possible impact of the misleading statements on the fairness of the election.

[5, 6] At the hearing in the unfair labor practice proceeding the Respondent made an offer of proof which included certain exhibits, an affidavit of the Respondent's personnel director, and the testimony of a representative of the Equitable Life Assurance Society. This evidence was excluded on grounds urged by General Counsel. The Respondent here argues that the exclusion of this evidence was error and tantamount to a denial of a "full and fair hearing in the unfair labor practice proceeding." We cannot agree. The same argument was made and rejected as without merit in N. L. R. B. v. Parkhurst Manufacturing Company, supra, a case factually similar to the one now before us. See also N. L. R. B. v. J. W. Rex Company, supra.

The offered evidence related only to the issues raised and decided in the representation proceeding and was,

at best, cumulative; in fact, the exhibits and the affidavit of the Respondent's personnel director were received by the Regional Director during the course of his investigation and were part of the record. The exclusion of the evidence was proper under the circumstances. Pittsburgh Plate Class Co. v. National Labor Relations Board, 313 U.S. 146, 162, 61 S.Ct. 908, 85 L.Ed. 1251 (1941); Rockwell Manufacturing Co., etc. v. N. L. R. B., 330 F.2d 795, 797, 798 (7th Cir. 1964); N. R. L. B. v. Parkhurst Manufacturing Company, supra; N. L. R. B. v. Worcester Woolen Mills Corp., 170 F.2d 13, 16 (1st Cir. 1948), cert. den. 336 U.S. 903, 69 S.Ct. 489, 93 L.Ed. 1069. The Respondent waived a hearing and agreed to be bound by the decision of the Regional Director on the issues raised by the objections filed in the representation proceeding. It had no right to relitigate the same issues in the unfair labor practice proceeding. Ibid. The case of N. L. R. B. v. Trancoa Chemical Corporation, 303 F.2d 456 (1st Cir. 1962), relied upon by the Respondent, is not to the contrary. See footnote 6 appearing on page 461.

We have considered the other arguments herein made by the Respondent and conclude that they are clearly without merit.

A decree for enforcement of the Board order may be submitted.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. JAS. H. MATTHEWS & CO., INDUSTRIAL MARKING PRODUCTS DIVISION, Respondent.	No. 14880

Decree

Before: GANEY, SMITH and FREEDMAN, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent on February 11, 1964. The Court heard argument of respective counsel on December 8, 1964, and has considered the briefs and transcript of record filed in this cause. On February 11, 1965, the Court, being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Third Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Jas. H. Matthews & Co., Industrial Marking Products Division, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

BY THE COURT
WILLIAM F. SMITH
Circuit Judge

DATED: April 6, 1965

Sur Petition for Rehearing

Present: BIGGS, *Chief Judge,* MCLAUGHLIN, KALODNER, STALEY, HASTIE, GANEY, SMITH and FREEDMAN, *Circuit Judges.*

The Petition for rehearing filed by JAS. H. MATTHEWS & CO., INDUSTRIAL MARKING PRODUCTS DIVISION, Respondent in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT

WILLIAM F. SMITH
Judge

Dated: April 6, 1965